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In the Supreme Court of the United States

DECEMBER TERM OF 1958

HELEN A. DAVENPORT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO: the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Helen A. Davenport, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 22, 1958.

OPINIONS BELOW

No opinion was rendered by the trial court. The verdict of the jury appears upon page 5 of the Transcript of Record. The opinion of the Court of Appeals

is not yet officially reported; it is set forth hereinafter as appendix "A".

JURISDICTION

The Court of Appeals entered its opinion on October 22, 1958. A petition for rehearing was timely filed and denied upon December 5, 1958. The jurisdiction of this court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

Petitioner has been found guilty of violating Title 18 USC Sec. 371, Conspiracy, under an accusation of conspiracy to violate Title 18 USC Sec. 1341 and Title 15 USC Sec. 77q (a), Mail Fraud and Fraud in the Sale of Securities, and has been sentenced to imprisonment for a period of one year.

The questions involved concern the construction and efficacy of the indictment. Briefly stated the matter is as follows:

This was a joint trial. The indictment (Tr. of R. p. 1) is in the form of a series of jointly charged substantive counts to which a conspiracy count has been added based upon incorporation by reference from the substantive counts. The indictment contains thirteen counts and its title lists nine defendants. The first twelve counts are the substantive counts; the thirteenth is the conspiracy count.

However, only seven of the defendants are accused in the substantive counts. The only count in which all nine of the defendants named in the title are listed as

the accused is the conspiracy count. Despite this fact, the allegations of fact charging acts and intent in violation of substantive statutes of the United States, necessarily the subject of any conspiracy agreement punishable under Title 18 USC 371, all appear in the first paragraph of the first substantive count where they are couched solely as the acts and intent of the seven defendants jointly accused in that count.

The result is that only seven persons are described by the allegations of fact of the indictment as having jointly acted so as to have intended to violate substantive statutes of the United States, while the accusation made is that nine combined and confederated to do so.

There is appended hereto as Appendix "C" the first substantive count and the thirteenth count less its allegations of overt acts.

Petitioner is one of the two persons whose names were added to the list of accused in the conspiracy count and concerning whom there are no allegations of fact from which to draw an inference in support of any such accusation, i.e. she is not an accused in the substantive counts nor is there any mention of her name in the allegations thereof.

The questions presented are:

(1) Does the indictment allege facts sufficient to charge petitioner with crime?

(2) Under the general rules defining relevant material evidence as that responsive to the issues made up by the allegations of fact of the indictment, and the particular rule that renders the evi-

dence of the acts and intent of petitioner's alleged co-conspirators inadmissable against her until after the existence of a conspiracy be first established, by what means, if any, can evidence relevant and material to the acts and intent of petitioner's alleged co-conspirators described in the first paragraph of the first substantive count, and essential to the establishment of a conspiracy, be said to have become admissable against petitioner?

(3) In any event, should the crime of conspiracy be expanded in definition and proof beyond the fashion in which this indictment treats of petitioner's co-defendants, to a new class of persons to be treated in the fashion in which this indictment treats of petitioner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States reads as follows:

> "*Rights of accused in criminal prosecutions.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Rule 7 (c) of the Federal Rules of Criminal Procedure reads as follows:

> "*Nature and Contents.* The indictment or the in-

formation shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Title 18 USC 1341 reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Title 15 USC 77q (a) reads as follows:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

* * * *

Title 18 USC Sec. 371 reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

STATEMENT OF THE CASE

Petitioner was tried for a violation of a criminal statute of the United States in the United States District Court for Oregon pursuant to Title 18 USC Sec. 3231.

The allegations of this indictment are as follows:

Paragraph one of the first count charges that the defendants Errion, Munkers, Wright, Bones, Locke, Montgomery and Martin:

> ". . . devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative, hereinafter called "purchasers," by means of false and fradulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made.":

There then following a detailed description of the scheme, artifice and representations of the above named defendants alleged as acts performed by them with the foregoing intent.

The second paragraph of the first count then alleges a specific instance of the use of the mails by these accused. The first paragraph of the first count is then incorporated by reference as the first paragraph of each succeeding substantive count; the second paragraph of each setting forth either a use of the mails or a sale of a security by use of the mails, pursuant thereto.

The conspiracy counts lists these same seven accused and adds the name of petitioner and one Williams (against whom the cause was dismissed during trial

because of ill health) and accuses that this number of defendants

> ". . . did conspire, combine, confederate, and agree with each other to commit the following crimes and offenses against the United States:
>
> "Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to take the money and property from purchasers of memberships in the Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now re-alleged and incorporated by reference;
>
> "Violations of Section 77q(a), Title 15, U.S.C., by employing said scheme and artifice to defraud, obtaining money and property by means of untrue statements and omissions to state material facts necessary in order to make the statements true, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;"

A portion of the allegations of fact of the first paragraph of the first substantive count charges the accused therein with the following acts and intent as part of their scheme:

> "As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with The Davenport Corporation, a corporation controlled by defendants, as a means by which said Davenport Corporation would and did claim and receive and convert

to the use and benefit of defendants a large portion of the moneys which had been received from said purchasers of Mt. Hood memberships; and as a further part of said scheme and artifice and in order to make secret profits for themselves, said defendants would and did cause agents, employees, and officers of Mt. Hood to procure options in the name of said Davenport Corporation on real estate which was to be purchased by Mt. Hood, and would and did obtain funds from Mt. Hood with which to purchase said real estate in the name of said Davenport Corporation, and would and did then resell said real estate of Mt. Hood at great profit to said Davenport Corporation and defendants."

The evidence offered to prove the foregoing allegations showed that the Davenport Corporation had petitioner as its president. The documents introduced in support thereof bore her signature as such, while other evidence of surrounding circumstances was introduced of the association of the defendants accused in the foregoing paragraph with petitioner and sufficient to support the foregoing allegations against the seven accused thereof.

The instructions of the trial court drew no distinction between petitioner and her co-defendants other than to point out that she was charged only in the conspiracy count:

"I think this is an appropriate place to point out that, with the exception of Mr. Davenport, a separate crime or offense is charged against each of the defendants in each count of the indictment . . ." (Tr. p. 1774).

"These counts charge all of the defendants who are on trial, with the exception of Mrs. Davenport, with violation of this law." (Tr. p. 1788).

"Each of the defendants, with the exception of Mrs. Davenport, is charged in every count." (Tr. p. 1801).

The trial court dealt with the facts of the case under instructions concerning the first paragraph of the first substantive count, and petitioner was included in these instructions just as if these allegations made up the same issue of fact as to her as to those actually accused thereof (Tr. p. 1778):

"There was evidence in this case that one or more of the defendants named in the indictment organized the Mt. Hood Hardboard and Plywood Cooperative, as well as certain other cooperatives and corporations, and that they used these corporations as well as existing corporations, such as the Davenport Corporation, for the purpose of siphoning off money paid in by the purchasers of memberships in the Mt. Hood Cooperative. If you find that the Government has proved this scheme to defraud as to one or more of these defendants, the first essential element in the indictment will have been satisfied . . . You will next consider which defendants, if any, participated therein. If you find that one or more of the defendants devised or participated in a scheme to defraud by knowingly and willfullying assisting in the setting up of corporations or the use of existing corporation to permit him or one or more persons to siphon off money paid in by the purchasers of memberships in the Mt. Hood Cooperative, then that defendant is chargeable with participation in the scheme, even though he himself, never made any representations of any kind to a prospective purchaser of memberships . . . and likewise he may be chargeable even though he himself did not personally benefit from it, but if he participated and such participation permitted or assisted another person to defraud the co-op or the members."

Under the conspiracy count the trial court only instructed generally as to the definitions of the conspiracy and the evidence of combination and etc., sufficient to support such a finding (Tr. p. 1970 et seq.).

As the Court stated (Tr. p. 1797):

> "I shall not discuss the facts with reference to this conspiracy count because all this has been covered in the previous instructions . . ."

REASONS FOR GRANTING THE WRIT

I

A.

The issue presented is a new matter in the law of conspiracy and one of the utmost importance to the future.

If the manner of petitioner's indictment remains approved, a new principal will be established. Any number of persons may be tacked on to such a conspiracy count like an afterthought, their imprisonment to be left to the sound discretion of the jury, considering the surrounding circumstances revealed during the prosecution and conviction of others for the substantive offense involved.

In *U. S. v. Falcone*, 109 F. 2d 579, at page 581 (Second Circuit, 1940), the court states:

> ". . . so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

In the case at bar petitioner is an elderly widow in her 80's, so small and elderly in appearance that she was not even asked to state her exact age (Tr. p. 1420, as corrected). She has a lifetime of civic effort behind her. She was Portland's "Woman of the Year" in 1954 (Tr. p. 1422). Obviously, she was physically incapable of the energy, interest or desire either to engineer or knowingly partake of a half million dollar swindle that was to be actually nothing less than an attempted outright theft of some $300,000.00 from the cooperative's treasury by the principal malefactor, Errion, and which could no more escape detection than a daylight bank robbery, and that had to be followed by a race to the border with Federal authorities in hot pursuit. No matter how horrendous petitioner's "connection with the scheme" may sound, it is to this that such a person as petitioner is supposed to have been a "conspirator," even though, to borrow from the language of the instructions, she "did not personally benefit." Obviously the definition thereof has to be stretched to include someone less than guilty of an intent to commit the substantive offenses as such, in order to obtain her conviction.

In the *Falcone* case, supra, the Court is speaking of an accused charged in the indictment as a main offender, but whom the evidence showed to be upon the fringe. Petitioner's indictment in the case at bar boldly proposes a revision of the whole matter; that the definition of "conspirator" be stretched to include one who is not even mentioned in the allegations of fact descriptive of the joint substantive offense allegedly intended to be committed by others.

But whether by design or accident the intial error in the cause at bar is absurdly simple. In adding as an accused in the conspiracy count one who was not included as an accused in the substantive counts, which contain the allegations of fact from which the inference of conspiracy is to be drawn, the government got the cart before the horse. It failed to put these allegations in a count in which all of the defendants were named as accused so as to have the indictment allege that all of the alleged co-conspirators performed the acts made punishable by the substantive statutes, one with the other, with the intent to violate the same. This is an error that cannot be circumvented for the purpose of upholding petitioner's conviction without doing a great deal of violence to established rules.

It has long been recognized that while in a given case there may be no preconcert of plan excepting that necessarily inherent in mere joint action, "it is difficult to exclude that situation from the established definition of conspiracy." (Report of the Conference of Senior Circuit Judges of 1925 cited in *Krulewitch v. U. S.*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790). The use of this definition has grown into a practice which has been frowned upon by this court and of which this case is typical: That of crowning a series of joint substantive offenses with a conspiracy count based upon them.

In *Krulewitch v. U. S.*, supra, the first paragraph of the concurring opinion states as follows:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comments because it is characteristic of the long

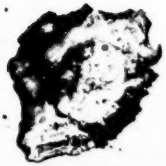
> evolution of that elastic, sprawling, and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protests of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

The criticism of such a practice is, of course, that it comes dangerously close to double jeopardy, for it makes the crime of conspiracy almost, but not quite, a legal fiction. The theory of such cases is as obvious as their mechanics. The facts from which guilt of the conspiracy count is to be inferred are as synonymous with the facts from which guilt of the substantive counts is to be inferred as the incorporation by reference purports them to be.

But the definition cannot be avoided. Conspiracy is the accused's agreement to participate in a substantive offense, and thus in the instance of an accomplished crime proof of the one will sustain the other. So in *Pinkerton v. U. S.*, 328 U.S. 640, 66 S. Ct. 1180, 40 L. Ed. 1489, Rehearing denied 329 U.S. 818, 67 S. Ct. 26, 91 L. Ed. 697, this court held evidence of the accused's agreement to participate in the substantive offense under a conspiracy count, sufficient in itself to establish his conviction for the substantive offense under a substantive count joined therewith.

B.

No one so far has done other than acknowledge that the indictment and proof in this case are framed upon



this definition of the crime. There was, of course, no direct evidence of an express agreement among any of the accused.

The trial court assumed that petitioner would have to be found guilty under the allegations of fact contained in the first substantive count and so instructed the jury. The Circuit Court of Appeals has affirmed her conviction by citing the allegations thereof concerning the Davenport Corporation hereinabove referred to, and referring to the proof adduced in the course of proving the same. The government, in its brief in that Court, maintained that "the fact that a grand jury has not indicted cannot in any way be construed to indicate that a person may not be guilty"; citing *Alexander v. U. S.*, 95 F. 2d 873, 8 Cir. 1938, cert. den. 305 U.S. 637. In that case the accused was separately indicted for conspiracy committed with a group of named co-conspirators who had previously been indicted for the same crime upon an earlier indictment. The accused contended that the failure to include him in the prior indictment was an admission of his innocence. The Appellate Court properly held that the fact that he had not been indicted before with the others did not mean that he could not be separately indicted at a subsequent time. This same case is cited by the Circuit Court of Appeals in its opinion herein in support of its statement that petitioner's contentions concerning this indictment are in error.

Petitioner maintains, however, that she is not an accused in the substantive counts of this indictment,

nor is her name mentioned therein, nor are the accused therein charged with having acted with any person or persons unknown. One can say that she is encompassed therein only by doing a great deal of violence to the English language. Patently, if this indictment and petitioner's conviction are to be upheld, the definition of a "conspirator" must be enlarged to a point beyond the fashion in which it is defined as to petitioner's co-defendants by this indictment, and the rules of evidence and the requirements of an indictment for conspiracy altered accordingly.

This indictment is perfectly valid as to petitioner's co-defendants who stood trial. It is in the usual, although deplorable, form as to them. The substantive counts charge each of them with personal, individual acts of having devised and intended to devise a scheme and artifice to defraud with intent to use the mails and to sell securities by mail through the use thereof. Proof of their guilt of these acts and intent as alleged against each of them, one with the other, will support the inference that they are guilty of the accusation of having combined and confederated to do so.

This is immediately apparent. But what about petitioner? What reasoning is available to enable it be said that the incorporation by reference of the allegations of fact of the substantive counts into the conspiracy count, which as to her alleged co-conspirators incorporates acts of their own and of one another, can serve the same purpose as to petitioner, as to whom the incorporation only incorporates the acts and intent

of others than herself, albeit they are her "alleged co-conspirators"?

It is patent upon the face of this indictment, buttressed by the definition of the crime which it purports to charge, that the only proof that was intended to be presented under it of the existence of a conspiracy agreement, or of the terms thereof, or of the parties thereto (who by being parties to the same brought it into the existence sought to be established), is what is alleged in the substantive counts as having been done by those charged therein.

C.

Since the theory upon which this indictment is based is that of the inference of conspiracy to be drawn from joint participation in acts in violation of a substantive statute, or as it is usually more formally stated; proof of an express agreement among those charged with acts in violation of a substantive statute is unnecessary since it will be presumed that they intended the probable consequences of their acts, petitioner encounters little difficulty in demonstrating that such allegations of fact of acts and intent showing an intended violation of a substantive statute upon the part of an accused are a necessary part of a conspiracy indictment against him.

It is stated is *U. S. v. Cruikshank*, 92 U.S. 542 (at page 558), 23 Law Ed. 533:

> ". . . the object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecu-

tion for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances . . .

". . . it is in some States a crime for two or more persons to conspire to cheat or defraud another out of his property; but it has been held that an indictment for such offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat or defraud in the mode made criminal by the statute;"

In *Pettibone v. U. S.*, 148 U.S. 197, 13 Sup. Ct. 542, 37 Law Ed. 419, it is stated (in 148 U.S. 197 at page 203):

". . . when the criminality of a conspiracy consists of an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

"This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the Circuit Court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct and impede . . ."

It is stated in *U. S. v. Britton*, 108 U.S. 199 (at page 204), 2 Sup. Ct. 531, 27 Law Ed. 698:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provisions of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae* so that before the acts done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The logic of this rule is apparent. Evidence of such acts is inadmissable against all until after the conspiracy itself has been established.

A cause that peculiarly echoes the indictment in the case at bar is *Hamner v. United States,* 134 F. 2d 592, where the court states upon page 595:

"Now the gist of the charge of conspiracy is the agreement to commit an offense or a fraud against the United States. An overt act must be done pursuant to the agreement before . . . the crime is complete, but its essence lies in the agreement. That agreement must be distinctly and directly alleged. Inference and implication will not, on demurrer, suffice. Aid cannot be sought in the allegations of what was done in pursuance of it . . ."

"What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven. Such a pleading invites the abuse of the conspiracy statute which has often happened by stating several substantive joint offenses and seeking conviction

not only for them but for a conspiracy as well. Such a thing is legally possible, but it emphasizes the necessity for clear-pleading of the conspiracy agreement as a thing to be proved separate and distinct from the substantive crimes."

In *Stokes v. U. S.*, 15 S. Ct. 617, 157 U.S. 187, 39 L. Ed. 667, this Court had precisely before it the sufficiency of an indictment charging conspiracy to use the mails to defraud.

In 157 U.S. 187 at page 188, this Court states as follows:

"We agree with the defendant that three matters of fact must be charged in the indictment and established by the evidence. (1) That the person charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the Post Office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the Post Office, or taken or received one therefrom.

"So also a conspiracy to commit such offense must state a combination between the defendants to do the three things requisite to constitute the offense. In this particular the indictment charges that the defendants 'did then and there conspire, combine, confederate, and agree together to commit the act made an offense and crime by Section 5480 . . . that is to say, the said defendants conspired . . . and agreed together in devising, and intending to devise, a scheme and artifice to defraud various persons, firms, and companies out of their property, goods and chattels, and particularly to defraud, (here follows the names of certain individuals and

firms,) and other persons, firms and companies to the grand jury unknown, out of their goods and chattels.'

". . . the indictment continues as follows: 'The scheme and artifice to defraud as aforesaid was *to be carried out* by each of said defendants representing himself to be engaged as a dealer in various kinds of merchandise . . . and the said defendants were *mutually to represent each other* . . . as financially responsible . . . *to be further effected* by ordering merchandise . . . having no intention . . . to pay for such merchandise . . .' etc.

"We think this states with sufficient clearness the first requisite of an indictment under Section 5480, of a scheme or artifice to defraud. The allegation is not of what was actually done, but of what the defendants conspired and intended to do."

Of course, what is stated in the *Stokes* case, supra, is nothing other than what the statutes involved require.

The Mail Fraud Statute, 18 USCA Section 1341, says the criminal is:

"Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department . . .";

and the Securities Act, Section 77q(a), 15 USCA, says the criminal is:

"Any person (who) in the offer or sale of . . . securities . . . by the use of mails—

1. (Employs) any devise, scheme or artifice to defraud, or
2. (Obtains) money . . . by means of any untrue statement . . . or
3. (Engages in) any . . . practice . . . which

operates . . . as a fraud or deceit upon the purchaser."

Admittedly, there can be no distinction in guilt, when a substantive offense is charged under either of these statutes, between the one who devises the scheme and the one who aids in the employment of the scheme, but the crimes to be charged, if they are to be found guilty of these statutes, *are the crimes denounced by these statutes.* The indictment must charge that the accused, *having devised or intending to devise a scheme or artifice to defraud,* used the mails in the course thereof, *or that he employed a scheme or artifice to defraud* in the sale of securities by the use of the mails.

Turning now to a charge of conspiracy to effect these offenses. First, a charge of conspiracy is limited to a conspiracy to commit an offense against the United States (Section 371, Title 18, USCA: "If two or more persons conspire either to commit an offense against the United States . . ."). It follows, therefore, that the indictment is necessarily limited in its description of the substantive offense to be described as the object of one accused of conspiracy, to a crime denounced by a substantive statute of the United States; in this instance, the accused himself intending, with others, *having devised and intending to devise a scheme or artifice to defraud,* using the mails in the course thereof, and *employing* a scheme or artifice to defraud in the sale of securities by use of the mails.

D.

A further illustration that one not himself charged with allegations of fact of acts and intent showing a personal intent, with others, to violate a substantive statute cannot be found guilty of a conspiracy to effect the same, can be found in those cases wherein a jury has returned a verdict of not guilty on either the substantive counts or the conspiracy count under an indictment in which the allegations of fact have been borrowed from one for the other such as in the case at bar. The problem presented is uniformly recognized as that of an inconsistent verdict. Most jurisdictions hold as stated in *Steckler v. U. S.*, 2d Cir., 7 F. 2d 59, 60:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they have no right to exercise, but to which they were disposed through lenity."

On the other hand, however, those that reverse the verdict of conviction do so upon the basis of the following language from *Boyle v. U. S.*, 8th Cir., 22 F. 2d 547 at page 548. In this case the appellate Court reversed a conviction of the accused for "knowingly" maintaining a nuisance because the jury had acquitted them upon a count of conspiracy to maintain the same.

> "There exists a diversity of opinion among the various federal courts as to the effect of an inconsistent verdict, where there are different counts in an indictment. On the one hand, it has been held that, where a jury convicts upon one count and acquits

upon another, the conviction will stand, though there is no rational way to reconcile the two conflicting conclusions. Such is apparently the holding in the second, sixth and seventh circuits (citing authority) . . .

"On the other hand, it has been held under similare circumstances that the conviction will not be allowed to stand, unless the verdict is supported by evidence other than the facts pleaded in support of the counts upon which acquittal has been had. This is the view adopted in this circuit and apparently in the third. (citing authority)."

Another situation that has arisen that casts light upon the position of petitioner in the case at bar, is that encompassed by the decision of this court in *Sealfon v. U. S.*, 332 U.S. 575, 68 S. Ct. 237, 92 L. Ed. 180.

The accused had been acquitted of conspiracy with one Greenberg to submit a fraudulent claim, and was then charged with the substantive offense of aiding and abetting Greenberg to submit the claim. In 332 U.S. 575, at page 579 the Court states:

"Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted . . . the jury was told petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg . . . Viewed in this setting the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

"So interpreted, the earlier verdict precludes a

> later conviction of the substantive offense. The basic facts in each trial were identical . . . petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way . . ."

The subsequent indictment was dismissed.

In the case at bar, the issues of fact upon which the conspiracy count is based are the same as those previously set forth in the substantive counts, just as in the *Sealfon* case, supra, the issue of fact upon which subsequent indictment for the substantive offense was based was the same as that previously alleged in the indictment of the accused for conspiracy.

In the *Sealfon* case, supra, this Court stated that since the subsequent indictment was based upon the same allegations of fact made against the defendant in the prior indictment of which the accused had been acquitted, the subsequent indictment had to be dismissed. No court, however, can say that in the case at bar the allegations of fact upon which the accusation of conspiracy against petitioner is based are the same as those of which she is accused in the previous substantive counts of this indictment.

It is obvious that the issue of fact upon which the guilt of the accused hinged in the *Sealfon* case, supra, and of which he was acquitted, is an issue of fact that is lacking as to petitioner in the case at bar; to-wit: allegations of act and intent upon her part from which an inference of intent to violate a substantive law

of the United States, either alone or with others, can be drawn.

Necessarily the same result must obtain.

E.

The lack of allegations of fact against petitioner naturally creates a corresponding problem as to the means of introducing evidence against her.

The allegations of fact set forth in the indictment, and the facts tending to prove such facts, are the facts in issue in a criminal cause. Evidence is admissible only if it is relevant and material to the facts in issue; all other evidence is irrelevant and therefore inadmissable. (*Wood v. U. S.*, 41 U.S. 342, 16 Pet. 342, 10 L. Ed. 987.) It should go without saying that evidence admitted upon the basis of its relevancy and materiality to the allegations of fact of an indictment can prove nothing more than the truth of those allegations as stated.

In and of themselves, therefore, if plain English be accepted, the allegations of fact of the substantive counts raise no issue as to petitioner and proof thereof is immaterial and irrelevant as to her.

Further, the rule that the acts and declarations of an alleged co-conspirator are not admissable against the accused until after the conspiracy itself has been first established, is as old as the crime of conspiracy itself. The rationale of the rule is obvious; it is only the conspiracy that makes the accused responsible for the acts of any of his alleged co-conspirators. It is not until after the conspiracy has been first shown, that he has

any connection with the conduct of his alleged co-conspirators that will permit evidence thereof to be considered as relevant, material and admissable as to him. (*U. S. v. Gooding*, 12 Wheat. 460, 469; Wigmore on Evidence, Vol. IX, Sec. 1079, page 127.)

But this is a rule more recognized in the violation than in the observance. As stated by Mr. Justice Jackson in his concurring opinion in *Krulewitch v. U. S.*, supra, upon page 453,

> "Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of the acts and declarations of each in the course of its execution are admissable against all. But the order of proof of so sprawling a charge is difficult for the Court to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy is often proved by evidence that is admissable only upon the assumption that conspiracy existed."

It is fundamental in this case that the existence of a conspiracy cannot be established except through proof of the allegations of fact set forth in the first paragraph of the first substantive count. Try as one may this cannot possibly be avoided. Without proof that a scheme and artifice to defraud was intended to be devised by someone, someplace, at some time, there could be no trial for conspiracy whatsoever under this indictment. That this proof came into this case solely as evidence of the acts and declarations of petitioner's co-defendants

and alleged co-conspirators is as plain as the fact that it is their names alone that are listed as the accused in the first paragraph of the first substantive count.

No mere lip service to the rule can get around this unique situation. The whole rule must be abandoned completely and considered as abolished in the instance of one indicted as petitioner.

If they have been validly indicted by reference to the substantive counts for allegations of fact descriptive of the object and subject of their alleged conspiracy agreement, then the object and subject of their alleged conspiracy agreement can likewise be proven against them in the initial instance in precisely the same fashion; by evidence of the acts and intent of their alleged co-conspirators offered to prove whatever it is that has been borrowed from the substantive counts to make whole the indictment against them.

This is an absurd situation.

II

If petitioner were only half-right; if she could only point out that this indictment treats of her differently than it does her co-defendants, but was without authority to show that the result was a fatally defective indictment, still the trial of an accused under such an indictment involves so much incoherence and resulting plain injustice as to warrant this court in refusing to countenance the same.

Certainly counsel for any one of the other defendants could argue to the jury that the guilt of his client

hinged upon their finding him guilty of joining in the perpetration of the substantive offense according to the allegations of fact made against him in the first substantive count.

Can counsel for one indicted as petitioner make the same argument? Can he follow it by reading the indictment aloud to the jury, asserting that his client, not being charged with having committed the substantive offenses under the substantive counts, could not possibly have intended to commit them, either alone or in conjunction with any others, under the conspiracy count?

If this is an improper argument, wherein is it improper; and to what extent?

Consider the defense of such an accused. Suppose the prosecution introduced evidence that, literally, someone else caused this contract to be executed in the name of the Davenport Corporation and obtained the benefits thereof, as it did in the case at bar by introducing the testimony of the counsel who drew it that he had no contact with petitioner, but drew the same after consultation with the defendant Errion and at the latter's request (Tr. p. 277-301), and the testimony of the treasurer of the cooperative that he delivered the checks in payment thereof directly to the same man without ever discussing the matter with petitioner (Tr. p. 158-160).

How can petitioner, or anyone else, "disprove" such "evidence" of their guilt? The transcript hardly begins to reveal the bizarre flavor of petitioner's defense against the charge of "conspiracy" as proven against her by

evidence offered in support of allegations of fact that others than herself were criminally responsible under the substantive counts for what they did through her.

Had the government made its first count the conspiracy count, setting forth therein allegations of fact charging all of the accused with acts and intent showing an intention to violate the substantive statutes upon the part of each, thereafter singling out such defendants as it desired to charge with substantive offenses, it would have been apparent that leniency alone had dictated the omission of any given accused from any such subsequent count.

As it is, however, the indictment of petitioner has all of the appearance of being dictated by necessity. It appears as if the government could not, but then, it need not, prove the acts and intent alleged in the substantive counts against petitioner as such.

In the meantime, however, it is as plain as a pikestaff that if any of petitioner's co-defendants wished to be acquitted of the conspiracy count, he had to get himself into the same position that petitioner was already in relative to the first substantive count; he had to be absent from the jury's consideration when they determined who was to be found guilty thereof!

How can a cause against one indicted as petitioner in the case at bar be said to be capable of intelligent submission to a jury?

Each of petitioner's co-defendants was to be found guilty of the conspiracy count upon the premise of the

truth of the allegations of fact charged against them in the substantive counts.

Obviously, however, the jury was entitled to commence its deliberation as to petitioner's guilt upon the premise that it was immaterial whether or not she was herself guilty of the allegations of fact of the substantive counts as such, since she was not charged with the same. Even such a view could be taken as that her alleged co-conspirators alone could be the only ones criminally responsible for what she did in furtherance of their accomplishment of the substantive offenses, and she could still be guilty of "conspiracy."

Who can ignore the obvious? If petitioner is not charged with first hand participation in the substantive offenses, why should such evidence be needed to prove her guilty of the conspiracy count? And if evidence of that nature be dispensed with, what can possibly remain?

If it is a poor situation now because, on the one hand, of the tendency to indict those with only a tenuous connection with the substantive offenses along with the main offenders, charging them with the allegations of fact descriptive of the crime of the latter for which their "conspiracy" then renders them liable and, on the other hand, because of the now firmly established practice of crowning a series of jointly charged substantive offenses with a conspiracy count based upon them, what will it be like in the future if this indictment and petitioner's conviction be allowed to stand?

The practice of adding a conspiracy count to substantive counts will then include permission to add to such a conspiracy count the name of any number of additional "conspirators" neither accused of, nor even mentioned in, the allegations of fact charging the substantive offense. The two worst features of the situation will have been combined into their ultimate, perfect and approved whole: a conspiracy conviction incidental to conviction for commission of the substantive offense, and moreover, incidental to the conviction of *others* for commission of the substantive offense. When you add that this will be done by borrowing from the allegations of fact made against those others in charging them with commission of the substantive offense, and that thus evidence of the acts and intent of their alleged co-conspirators will be directly admissible to prove the crime of such an accused, it can readily be seen that there will be no room for further improvement in the accusation of conspiracy as an instrument of oppression.

Respectfully submitted,

REUBEN G. LENSKE,
Attorney for Petitioner.

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HELEN A. DAVENPORT,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 15,689
Oct. 22, 1958

Appeal from the United States District Court for the District of Oregon.

Before: HEALY, FEE and HAMLIN, Circuit Judges.

HAMLIN, Circuit Judge:

Appellant, Helen A. Davenport, appeals from her conviction of the crime of conspiracy (Title 18 U.S.C. §371) as set out in Count XIII of an indictment which was tried in the United States District Court for the District of Oregon. In this count of the indictment appellant was charged, with eight other persons, with the crime of conspiracy to violate Section 1341 Title 18 United States Code (using the mails to defraud) and Section 77q(a) Title 15 United States code (using the mails in a scheme to defraud in the sale of securities in interstate commerce).

All of these nine defendants, except the appellant and one other, named Williams (who was later dismissed because of illness), were charged in the preceding twelve counts of the indictment with various substantive offenses which were alleged to be violations of §1341 Title 18 and §77q(a) Title 15, U.S.C. Count XIII, charging con-

spiracy, realleged and incorporated therein the first twelve counts of the indictment and designated them as overt acts done in pursuance of and to effect the objects of the conspiracy, and alleged in addition 28 other overt acts. In four of said overt acts, appellant was named.[1] In Count I of the indictment, seven defendants (excluding appellant and Williams) were charged in great detail with having devised a scheme to defraud and to obtain money and property by selling to purchasers for $1000 each membershipsin Mt. Hood Hardboard and Plywood Cooperative, herein called Mt. Hood, by representing among other things that purchasers of said memberships would obtain continuous employment and job security in a large modern sawmill, ploywood, and hardboard plant to be erected and owned and operated by the

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[1] "COUNT XIII

". . . .

"7. On or about October 1, 1954, at Portland, Oregon, defendant Helen A. Davenport signed a contract as president of The Davenport Corporation with Mt. Hood Hardboard and Plywood Cooperative providing for payment of a fee to The Davenport Corporation of 10% of the total amount received from the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative.

". . .

"12. On or about December 7, 1954 at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of $8,000.00, and transmitted said check to defendant Helen A. Davenport.

"13. On or about November 27, 1954, at Portland, Oregon, defendant Edgard Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of $6,500.00, and transmitted said check to defendant Helen A. Davenport.

"14. On or about January 13, 1955, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of $5,000.00, and transmitted said check to defendant Helen A. Davenport."

members thereof on a cooperative plan. Proper allegations were contained therein, alleging the falsity of the various representations, that they were made with the knowledge of the falsity and with intent to defraud. Finally, in said count, it was alleged that said seven defendants, for the purpose of executing the aforesaid scheme and device, "caused to be delivered by United States mails a certificate of membership in Mt. Hood" to a named individual.

Counts II to VII of the indictment, inclusive, after incorporating therein the detailed allegations of Count I, charged the similar delivery of certificates of membership to other named individuals, Counts VIII to XII of the indictment, after incorporating therein the detailed allegations of Count I, charged violations of §11q(a) Title 15 U.S.C. (fraud in the sale of securities) by delivering checks and membership certificates through the United States mails to other named individuals.

Appellant relies upon six specifications of error. We shall consider them generally in the order set out in appellant's brief.

Assignments of Error No. 1 and No. 1(a) make the contention that the indictment fails to state facts sufficient to charge the appellant with a crime, and that the evidence that could be produced under the indictment was necessarily irrelevant to any question of appellant's guilt or innocence of any crime, because of the limitations of proof imposed by its allegations.

The allegations of Count XIII, which charges the appellant and the eight other defendants with the crime

of conspiracy, §371 Title 18 U.S.C., appear to be in the usual form.

It alleges that the nine defendants did "conspire, combine, confederate and agree with each other to commit . . . violations of §1341 Title 18 U.S.C. by using . . . the mails of the United States for the purpose of executing the scheme and artifice to defraud and to obtain money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative as described in the first count of this indictment, which is here and now realleged and incorporated by reference;" and to commit "Violations of §77q(a) Title 15 U.S.C. by employing said scheme and artifice to defraud . . . in the sale of memberships in Mt. Hood . . . by the use of the United Statesmails, all as described in the preceding counts of this indictment and hereby incorporated by reference; . . . ." It is then alleged that all of the acts of the defendants as described in Counts I to XII are overt acts done by said defendants in pursuance of and to effect the ojects of said conspiracy; and it then proceeds to allege 28 additional overt acts, in four of which the appellant, Helen A. Davenport, is involved and named, as we have seen (Footnote 1). Similar forms of indictment have been frequently upheld. *Németc v. U.S.* (9 Cir., 1949) 178 F.2d 656; *Allen v. U.S.* (9 Cir., 1951) 186 F.2d 439, cert. den. 341 U.S. 948: *Donaldson v. U.S.* (9 Cir., 1957) 248 F.2d 364.

Appellant, it should be pointed out, filed no motion as provided for under Rule 12b(2) and (3), Federal Rules of Criminal Procedure, attacking the indictment

prior to trial, nor did she protest that the indictment was not sufficiently clear at that time.

Appellant seems to argue that because she was not charged with any offenses in the first twelve counts of the indictment that she was therefore acquitted of those charges and that proof of the facts alleged therein can not be used as establishing overt acts of the conspirators. This is not true. We hold that the indictment sufficiently charged the defendant with a crime. *Alexander v. U.S.* (8 Cir., 1938) 95 F.2d 873, cert. den. 305 U.S. 637; *U.S. v. Cohen* (2 Cir., 1944) 145 F.2d 82, cert. den. 323 U.S. 799; *Allen v. U.S., supra; Shayne v. U.S.* (9 Cir. 1958) 255 F.2d 739.

In Assignment of Error No. 2, appellant contends that she was prejudiced by not having a separate trial. A motion for severance was filed by the defendant prior to trial "upon the ground and for the reason that she would be prejudiced by remaining joined as a co-defendant". This motion was denied by the trial Court.

This motion, of course, is addressed to the discretion of the District Judge. Such a motion is rarely granted. It was stated in *Dowdy v. U.S.* (4 Cir., 1931) 46 F.2d 417, at 421, "Where two or more defendants are indicted for a joint transaction, it is inadvisable to split up the case into many parts for separate trials, in the absence of very strong and cogent reason therefor. This is especially true in conspiracy charges, from the very nature of the case." *Shockley v. U.S.* (9 Cir., 1948) 166 F.2d 704, cert. den. 334 U.S. 850; *U.S. v. Lebron* (2 Cir., 1955) 222 F.2d 531.

As Judge Augustus Hand aptly said in *U.S. v. Fradkin* (2 Cir., 1935) 81 F.2d 56 (conspiracy to use the mails to defraud):

> "A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats."

An examination of the record indicates that the District Court carefully explained to the jury the position of the appellant and the fact that she was only charged in Count XIII of the indictment and not charged with any other crime set forth in the first twelve counts of the indictment. We see no reason to interfere with the trial Court's discretion in this matter, as we find that no prejudice was suffered by the appellant. That the jury carefully distinguished between the charges against the various defendants is indicated by the fact that one of the defendants—Martin—was acquitted, while the other defendants who had not pleaded guilty were convicted.

In Assignment of Error No. 3, appellant complains of the giving of an instruction by the Court, which is set out below.[2]

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[2] "There was evidence in this case that one or more of the defendants named in the indictment organized the Mt. Hood Hardboard and Plywood Cooperative, as well as certain other cooperatives and corporations, and that they used these corporations as well as existing corporations, such as the Davenport Corporation, for the purpose of siphoning off money paid in by the purchasers of memberships in the Mt. Hood Cooperative. If you find that the Government has proved this scheme to defraud as to one or more of these defendants, the first essential element in the indictment will have been satisfied . . . . You will next consider which defendants, if any participated therein. If you find that one or more of the defendants devised or participated in a scheme to defraud by knowingly and willfully assisting in the setting up of corpora-

No specific exception was taken to this instruction by appellant as required by Rule 30 of the Federal Rules of Criminal Procedure. Therefore appellant cannot complain of it. However, we have examined the instructions given by the Court and find no error therein.

Assignment of Error No. 4 will be discussed in detail below.

Assignment of Error No. 5 was that the Court erred in informing the jury that the defendant Errion had pleaded guilty. It was apparently the contention of all of the defendants on trial that Mr. Errion was the culprit who was responsible for all of the criminal activities. The record shows that attempts were made during the trial by the defendants to place the blame upon Mr. Errion while attempting to show that they themselves were not guilty of the charges against them.

During the third day of the trial when some reference to Mr. Errion had been made, the Court stated, "We are not going to try Mr. Errion here any longer. He has pleaded guilty. He is safely in jail. I think we have all we can do to try the other six defendants that are here without discussing Mr. Errion any further." A few minutes later the Court made another statement involving the fact that Mr. Errion and Mr. Montgomery had

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tions or the use of existing corporations to permit him or one or more persons to siphon off money paid in by the purchasers of memberships in the Mt. Hood Cooperative, then that defendant is chargeable with participation in the scheme, even though he himself, never made any representations of any kind to a prospective purchaser of memberships . . . and likewise he may be chargeable even though he himself did not personally benefit from it, but if he participated and such participation permitted or assisted another person to defraud the co-op or the members."

pleaded guilty. This statement is set forth below.[3]

Later, during the Court's instructions, the Court instructed the jury properly upon that subject.[4]

No objection was made by anyone concerning the Court's reference to the pleas of guilty by Errion and Montgomery, nor was any exception taken of the Court's instruction, or any instruction requested by the appellant to be given by the Court upon this subject.

It was inevitable that during the testimony references would be made by the witnesses to the activities of Mr. Errion and Mr. Montgomery, and we see no error in the Court's informing the jury of the fact that these two persons had pleaded guilty. *Nemec v. U.S., supra; Holmes v. U.S.* (8 Cir., 1943) 134 F.2d 125, cert. den. 319 U.S. 776; *U.S. v. Dewinsky* (D.C. N.J., 1941) 41 F.Supp. 149.

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[3] "Ladies and Gentlemen, I want to make one thing clear to you, as I will in the instructions: These people that are on trial, these seven defendants are the only ones on trial. They are the only ones on trial, and you will be called upon to determine the guilt or innocence of these seven persons and no other persons. Mr. Errion is not involved in this case. I mean you will not have to determine whether Mr. Errion is guilty or not guilty. He has already pleaded guilty. The same is true of Mr. Montgomery."

[4] "As I told you at the commencement of this trial, Edgar Robert Errion and Roland L. Montgomery have entered pleas of guilty to certain counts in the indictment. The fact that they entered pleas does not necessarily mean that they alone are responsible for the crimes charged in the indictments, nor does it necessarily mean that each or any of the other defendants is guilty with them. In fact, it is no evidence of their guilt or innocence or that a crime was committed. (That is, the pleas of Errion and Montgomery are no evidence of the guilty of any of the defendants nor evidence that a crime was committed.) The guilt or innocence of the defendants who are on trial must be determined by you solely by the evidence introduced at this trial."

In appellant's Assignment of Error No. 4 she complains that the evidence is insufficient to sustain her conviction, and in Assignment of Error No. 6 appellant complains that the Court erred in denying her motion for a judgment of acquittal. We shall consider these two assignments of error together.

The evidence disclosed that the appellant was a business woman of considerable experience, having operated a real estate, money loaning, estate management, and insurance business. She had known Errion for over 20 years; had, with her husband, provided him with some moneys to promote an oyster bed operation which was unsuccessful. She knew he had fraud judgments against him, which made it inadvisable for him to operate openly. She had received from Errion an assignment of an annuity from one of Errion's fraud victims, which she later game back. She had been connected in at least two transactions with Errion which resulted in Errion's victims obtaining large judgments against him for his fraudulent practices.

The scheme charged in the indictment, which was amply proved, was carried out by means of newspaper advertisement, sales literature, and by salesmen. One representation was that if a person bought a membership of $1000 in Mt. Hood Hardboard and Plywood Cooperative he would receive "job security". He would also be guaranteed employment in a modern plywood and hardboard plant costing him from three to five million dollars which was to be erected at once. Representations were also made that finances to construct the plant had

been arranged for and that investors' funds would be held and *used only for working capital*. Representations were also made that an adequate supply of timber was assured.

The evidence clearly established the falsity of these representations.

Appellant's connection with this scheme may be briefly summarized.

A paragraph of the indictment referring to the Davenport Corporation was as follows:

> "As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with The Davenport Corporation, a corporation controlled by defendants, as a means by which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants a large portion of the moneys which had been received from said purchasers of Mt. Hood memberships; and as a further part of said scheme and artifice and in order to make secret profits for themselves, said defendants would and did cause agents, employees, and officers of Mt. Hood to procure options in the name of said Davenport Corporation on real estate which was to be purchased by Mt. Hood, and would and did obtain funds from Mt. Hood with which to purchase said real estate in the name of said Davenport Corporation, and would and then did resell said real estate to Mt. Hood at great profit to said Davenport Corporation and defendants."

The evidence disclosed that appellant was the owner of all of the shares of stock of Davenport Corporation with the exception of two qualifying shares. It further showed that at the original incorporators' meeting, where only eight persons were present, a contract was entered

into between Mt. Hood and Davenport Corporation whereby Mt. Hood was to pay to Davenport Corporation a 10% fee of money received from memberships for organization and assistance in financing. This contract also provided that these duties were to be performed by the Davenport Corporation with "due diligence".

The words "Copyrighted by The Davenport Corporation, Portland, Oregon" were printed on sales literature, on applications for membership forms, and on the membership certificates. The evidence further showed that over a period of time some $80,000 was received by the Davenport Corporation. These funds were generally received by means of checks made payable to the Davenport Corporation and deposited in its bank account. There was ample proof of the heretofore set out four overt acts referring to appellant.

Concerning the real estate transaction referred to in the indictment, it appears that options were taken for the purchase of this land in the name of Davenport Corporation at certain prices. Thereafter, the Mt. Hood corporation supplied funds for the purchase of the property at prices considerably in excess of the prices at which options had been obtained by Davenport Corporation. The result was that a profit on the transaction by Davenport Corporation was realized in the claimed amount of some $25,000.

Approximately $550,000 was received by Mt. Hood from the sale of "memberships". As indicated above, under the representations made to the prospective members, *this money was to be held and used only for a*

working capital. However, some $250,000 of this money was used for other purposes. A part of this $250,000 included the 10% fee paid to the Davenport Corporation under the written contract.

In order to counteract the effect of this and other evidence, the appellant took the witness stand. She testified that she had no knowledge of any of the nefarious schemes of Errion and his associates. She contended that Errion came to her and suggested that the Davenport Corporation be used to handle certain funds to be received from the sale of memberships in Mt. Hood. According to the plan as testified to by her, Errion was to receive the 10% provided for in the contract to the Davneport Corporation after this money had been first deposited in a bank account of that corporation, and that then the Davenport Corporation was to pay the money over to Errion. She testified that for this service Errion agreed that appellant was to get 10% of Errions's 10% or 1% of the total received.

She testified that on numerous occasions Errion gave her checks payable to Davenport Corporation, that she went to the bank with him, deposited the checks in the account of the Davenport Corporation, then bought cashier's checks payable to Davenport Corporation and endorsed these checks and presented them to Errion. She testified that this banking arrangement was made so that Errion would be protected against an outstanding judgment against him. She later testified, however, that this judgment, which she claimed was the reason for the arrangement, had been paid off and merely had been left on the record.

The appellant denied that the funds in the account of the Davenport Corporation belonged to her or to the corporation, and she alleged that she was merely doing this as a convenience to Errion. She did admit, however, on cross examination, that at one time she received $2500 from these funds as a return on some moneys which Errion had owed to her.

A view of the checks indicates that they were either endorsed in blank by appellant for Davenport Corporation, or were cashier's checks endorsed by her. Thus, the checks themselves are no aid in determining the disposition that was being made of the funds.

Concerning the real estate transactions covering the property in California, the appellant contended that neither she nor her corporation had any interest in this transaction. She contended that she received a telephone call from Errion asking that she send to him $10,000 to buy some timber land. However, instead of doing this, she arranged with a bank in California that the money be paid out under the authority of her nephew there. Although she had said that the money in the account belonged to Errion, she would not permit him to get it, but wanted her nephew to handle it so that it would be used only to buy land "so that I could hold the property, get something on the indebtedness he had." If the money in the bank account belonged to Errion solely, it is difficult to understand her refusing to let Errion handle the transaction entirely without her putting restrictions upon the transfer of the funds.

The appellant contended in her extensive testimony

before the jury that she was innocent of any wrongdoing and that she had little knowledge of the activities of her co-defendants. This, of course, is a matter for the jury to determine from all of the evidence in the case. The trial last twelve days. We have not attempted to set forth all of the evidence of appellant's activities. It was for the jury to determine where the truth lay. They were not required to believe the appellant.

The offense of conspiracy charged against appellant and her co-defendants can rarely be proved by direct evidence. "To constitute an unlawful conspiracy no formal agreement is necessary . . . ." *Blumenthal v. U.S.*, (9 Cir., 1946) 158 F.2d 883 at 889; aff. in 332 U.S. 539. Conspiracy may be proved by circumstantial evidence. *Pereira v. U.S.*, 347 U.S. 1, 1954; *Levine v. U.S.*, (9 Cir., 1935) 79 F.2d 364; *Van Riper v. U.S.* (2 Cir., 1926) 13 F.2d 961; *Seeman v. U.S.* (5 Cir., 1938) 96 F.2d 732. In fact, that is the way it is most often proved. See this Court's opinion in *Lile v. U.S.*, Sept. 2, 1958, F.2d , and the cases cited therein.

It was the province of the jury to determine from all of the evidence of the activities of the appellant and her co-defendants whether a conspiracy to defraud had been entered into and if so, which defendants were parties to that conspiracy. Their verdict was that one defendant was not guilty and that the others were guilty.

It is the function of this Court in reviewing a record such as this, after a verdict of guilty, to take the view of the evidence which is most favorable to the appellee. We are required to accept as true all facts which are

reasonably shown by the evidence. *Glasser v. U.S.*, 315 U.S. 60, 1942; *Suetter v. U.S.* (9 Cir., 1944) 140 F.2d 103; *Remmer v. U. S.* (9 Cir., 1953) 205 F.2d 277; *Schino v. U.S.* 9 Cir., 1954) 209 F.2d 67.

We believe the evidence is sufficient to sustain the guilty verdict against the appellant and that the Court did not err in denying her motion for a judgment of acquittal.

Accordingly, the judgment is affirmed.

(Endorsed:) Opinion. Filed Oct. 22, 1958.

Paul P. O'Brien, Clerk.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HELEN A. DAVENPORT, Appellant,	)	
vs.	)	No. 15689
UNITED STATES OF AMERICA, Appellee.	)	

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judge of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: October 22, 1958
PAUL P. O'BRIEN, Clerk

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA	)	
Plaintiff	)	No. 18230
v.	)	
	)	INDICTMENT
EDGAR ROBERT ERRION, also known as BOB ERRION,	)	Viol.
GLENN R. MUNKERS,	)	Sec. 1341, Title 18, U.S.C.
ALAN WRIGHT,	)	Sec. 77q, Title 15, U.S.C.
ARCHIE L. BONES,	)	Sec. 371, Title 18, U.S.C.
W. W. LOCK,	)	
ROLAND L. MONTGOMERY,	)	Using Mails to defraud
RICHARD C. WILLIAMS,	)	Securities Act
HELEN A. DAVENPORT, and	)	Conspiracy
HOWARD MARTIN,	)	
Defendants	)	

UNITED STATES OF AMERICA)
) ss.
District of Oregon)

The Grand Jurors of the United States of America for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations do find, charge allege and present:

COUNT I.

Using the Mails to Defraud
18 U.S.C. 1341

1. That prior to March 1, 1954, and continuing to the date of this indictment, the defendants Edgar Robert Errion, also known as Bob Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, and Howard Martin, devised and in-

tended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative, hereinafter called "purchasers," by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made.

As a part of said scheme and artifice, on and prior to September 1954, defendants would and did arrange for the incorporation of an Oregon cooperative association under the name of Mt. Hood Hardboard and Plywood Cooperative (hereinafter called Mt. Hood), and would and did falsely and fraudulently represent to said purchasers of memberships that said Mt. Hood was about to construct a large and modern sawmill, plywood, and hardboard plant at Estacada, Oregon, which would be owned and operated by the members on the cooperative plan.

As a further part of said scheme and artifice, in September 1954, defendants would and did also cause to be organized and incorporated another Oregon cooperative association under the name of Forest Products Cooperative Agency, through which defendants would and did employ salesman and carry on a large-scale sales campaign to sell memberships in Mt. Hood to purchasers residing in Oregon and elsewhere, and defendants would and did make and cause to be made to said purchasers the false representation, pretense, and promise that purchasers would obtain continuous employment and job security for themselves and their families in said operations of Mt. Hood, and would and did by this

means sell memberships in said Mt. Hood at the rate of $1,000.00 each to approximately 650 persons, for a total amount of approximately $650,000.00.

As a further part of said scheme and artifice, defendants would and did organize and activate numerous other cooperative associations, including General Timber Cooperative, Timber Cooperative of America, Timber Cooperative of Oregon, Timber Exchange of America, and Timber Exchange of Oregon, none of which associations had any assets or business activities, and all of which were used by defendants for the purpose of deluding and deceiving said purchasers into the false belief and impression that said cooperative organizations were able to and would furnish to said Mt. Hood all the timber needed for its operations, and were able to and would render valuable services to Mt. Hood in marketing its products

As a further part of said scheme and artifice, defendants would and did have defendants Williams, Wright, and Lock, and persons related to them, dominate and control the board of directors of said Mt. Hood and officers of Mt. Hood.

As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with The Davenport Corporation, a corporation controlled by defendants, as a means by which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants a large portion of the moneys which had been received from said purchasers of Mt. Hood member-

ships; and as a further part of said scheme and artifice and in order to make secret profits for themselves, said defendants would and did cause agents, employees, and officers of Mt. Hood to procure options in the name of said Davenport Corporation on real estate which was to be purchased by Mt. Hood, and would and did obtain funds from Mt. Hood with which to purchase said real estate in the name of said Davenport Corporation, and would and did then resell said real estate of Mt. Hood at great profit to said Davenport Corporation and defendants.

As a further part of said echeme and artifice, defendants would and did on or about May 2, 1955, cause to be organized a corporation known as Clackamas Building Association, Inc., and in order to lull said purchasers into a false sense of security and reassure them that construction of the Mt. Hood plant was about to commence, would and did falsely and fraudulently represent to purchasers that said Clackamas Building Association, Inc. had made arrangements with, and obtained a commitment from, a responsible financial group that it would advance all necessary funds to the Clackamas Building Association, Inc. to provide for construction and equipping of the sawmill, hardboard, and plywood plant of Mt. Hood.

And it was a further part of said scheme and artifice that said defendants, in order to induce said purchasers to purchase memberships in Mt. Hood, and in order to lull the said purchasers into a false sense of security with respect to their purchase, and to falsely reassure said purchasers so they would induce others to purchase

memberships, and in order to enable the defendants to convert to their own use and benefit and retain a large part of the moneys paid in by the purchasers for said memberships, and in order to induce said purchasers to retain their memberships, would and did make and acuse to be made to said purchasers false and fraudulent pretenses, representations, and promises, including, among others, the following:

(1) That purchasers of membership certificates would be assured of jobs and job security in a large, modern sawmill, plywood and hardboard plant to be constructed at Estacada, Oregon.

(2) That sufficient finances had been arranged for and assured to pay for the entire cost of construction, and equipping of a modern sawmill, plywood and hardboard plant, large enough to employ all members of Mt. Hood.

(3) That a syndicate of wealthy timber owners, including Richard C. Williams, president of Mt. Hood, was making a large financial investment in the Mt. Hood enterprise for the purpose of providing a cooperative outlet for the manufacture of their timber into lumber and plywood.

(4) That funds paid in by members to purchase certificates of membership in Mt. Hood would be retained in a reserve fund to provide working capital for use after commencement of operations of the plant of Mt. Hood.

(5) That an adequate supply of logs for the initial

operations of the plywood and hardboard plant was assured from timber held by Richard C. Williams, president of Mt. Hood, and other officers and promoters of Mt. Hood.

(6) That General Timber Cooperative controlled large tracts of timber which would be adequate to supply timber for Mt. Hood's operations and would be sold to Mt. Hood at the market price.

2. On or about November 20, 1954, in the State and District of Oregon and within the jurisdiction of this court, the defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did knowingly, wilfully, unlawfully, and feloniously cause to be delivered by the United States mails a certificate of membership in Mt. Hood Hardboard and Plywood Cooperative to Howard Lee Smith, Route 2, Box D-1, Estacada, Oregon.

* * * * *

COUNT XIII.

Conspiracy
18 U.S.C. 371

Prior to March 1, 1954, the exact date being to the grand jurors unknown, and continuing to the date of this indictment, the defendants, Edgar Robert Errion, also known as Bob Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L Montgomery, Howard Martin, Richard C. Williams, and Helen A. Davenport, in the State and District of Oregon and within the jurisdiction of this court, and at divers other places, did conspire, combine, confederate, and agree

with each other to commit the following crimes and offenses against the United States:

Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to obtain money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now realleged and incorporated by reference; and

Violations of Section 77q (a), Title 15 U.S.C., by employing said scheme and artifice to defraud, obtaining money and property by means of untrue statements and ommissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices, and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;

Each and all of said acts of the defendants as described in Counts I through XII, inclusive of this indictment are here and now realleged and incorporated herein and designated as overt acts done by the said defendants in pursuance of and to effect the objects of said conspiracy; and in pursuance of said conspiracy and to effect the objects thereof, the defendants per-

formed additional overt acts, including, among others, the following, to-wit:

(There then following 28 allegations of further overt acts.)

FILE COPY

FILED

In the Supreme Court of the United States

October Term, 1959

Ellis A. Dorsey, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WILLIAM F. TYLER,
Assistant Attorney General,
BEATRICE ROSENBERG,
VINCENT A. TEL,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 606

HELEN A. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 15;[1] Pet. App. A) is reported at 260 F. 2d 591.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 1958 (R. 16; Pet. App. B), and a timely petition for rehearing was denied on December 5, 1958 (R. 17). The petition for a writ of certiorari

[1] "R." designates Volume I of the Record (pp. 1-18). This volume contains, *inter alia*, a copy of the 15-page indictment (IR. —), the verdict, the sentence and the proceedings had in the Court of Appeals. The trial transcript consists of 7 volumes and is designated "T.".

was filed on December 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's indictment and conviction for conspiracy to commit mail fraud offenses was invalid because she was not also indicted for the substantive offenses.

STATEMENT

On October 3, 1956, petitioner and eight others were indicted in the last count of a 13-count indictment, returned in the District Court for the District of Oregon, with conspiring to violate 18 U.S.C. 1341 (using the mails to defraud) and 15 U.S.C. 77q(a) (using the mails in a scheme to defraud in the sale of securities in interstate commerce) (IR. 10–14). The preceding 12 counts charged the defendants, except for petitioner and defendant Williams, with particular substantive mail fraud offenses in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a) (IR 1–10).[2]

Count 1—which did not name petitioner—contained a general description of the scheme to defraud. The plan consisted of the organization of the Mt. Hood Cooperative, purportedly set up for the purpose of building and operating a large scale sawmill, plywood and hardboard plant. The indictment charged that, by means of a large scale advertising campaign, the named defendants represented, *inter alia*, that this

[2] Prior to the trial, defendant Errion pleaded guilty to counts 2 and 9 and defendant Montgomery to count 13. The indictment was dismissed as to defendant Williams during the trial, due to his serious illness (T. 1111–1414).

cooperative would provide continuous employment and job security to its members; that finances to construct the plant had been arranged for; and that the funds paid to purchase certificates of membership would be retained in a reserve and used only for working capital. As a result of these inducements, it was alleged, 650 people purchased shares in Mt. Hood, at $1,000 per share. In fact, these statements were not true, the actual purpose of the plan being to siphon off these funds invested in Mt. Hood, to the personal profit of the defendants. This was accomplished, in part, by having Mt. Hood enter into a service contract with the Davenport Corporation, which was controlled by defendants. Under the agreement the defendants were able to obtain a large portion of the invested funds as secret profit. Additionally, the Davenport Corporation was utilized in real estate transactions which further worked to deplete the funds invested in Mt. Hood (IR. 1–4).

The second portion of count 1 charged the named defendants with mailing a certificate of membership in Mt. Hood to a particular purchaser in violation of 18 U.S.C. 1341 (IR. 4). Each of counts 2–7[3] realleged by reference the general scheme spelled out in count 1, and each charged a particular use of the mails in violation of 18 U.S.C. 1341 (IR. 5–7). Counts 8–12, charging the fraudulent sale of securities by mail, likewise incorporated by reference the general scheme to defraud as described in count 1, and alleged particular sales of securities (IR. 7–10).

[3] Count 4 was dismissed at the conclusion of the trial.

The conspiracy count (count 13), the only one in which petitioner was named, "realleged and incorporated by reference" the scheme to defraud as set out in count 1, and incorporated as overt acts in furtherance of the conspiracy, each of the particular substantive violations set out in counts 1–12 (IR. 10). Twenty-eight additional overt acts were enumerated, petitioner being named in four of these (IR 11–14; Pet. App. A, p. 34, fn. 1).

Following a jury trial, petitioner was found guilty under the conspiracy count (count 13) and sentenced to imprisonment for one year (R. 8).[*] The Court of Appeals unanimously affirmed petitioner's conviction (R. 15; Pet. App. A).

ARGUMENT

Petitioner does not here challenge the holding of the Court of Appeals that the evidence is sufficient to sustain her conviction. She attacks solely the validity of the indictment. Petitioner argues that, not having been named as a defendant in the substantitive counts—particularly count 1 which described the scheme to defraud—she could not have been indicted for, or convicted of, conspiracy to commit the substantive offenses. This contention appears to proceed on the novel theory that the absence of a substantive charge against petitioner was tantamount to an allegation that she was innocent of any involvement or par-

[*] The other defendants named in the indictment who were convicted were sentenced as follows: Munkers 7 years; Errion 6 years; Bones 18 months; Locke 3 years; Wright 15 months; Montgomery 15 months (R. 9). Defendant Martin was acquitted on all counts.

ticipation in the scheme to defraud, thus rendering the conspiracy charge fatally defective. This argument is without merit.

A conspiracy to violate the mail fraud statutes is a separate and distinct offense from the substantive crime of mail fraud (*Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643–644). It may be, as petitioner seems to argue, that as a member of the conspiracy she could also have been held responsible for the substantive offenses even though she may not have directly performed the mailings which found the basis of those counts (*Pinkerton* v. *United States*, 328 U.S. 640). But it does not follow that, because the grand jury did not indict her for all the offenses for which she might have been tried, she could not be tried for one for which she was indicted. See *United States* v. *Thompson*, 251 U.S. 407, holding that even if one grand jury may refuse to indict, an indictment subsequently returned by another grand jury, on the same facts, is valid and may sustain a conviction. See also, *Alexander* v. *United States*, 95 F. 2d 873 (C.A. 8), certiorari denied, 305 U.S. 637.

While petitioner may not have been a prime mover in the extensive criminal scheme to defraud the investors in the Mt. Hood Cooperative, the evidence adduced at the trial, as discussed in the opinion of the court below, was certainly sufficient for the jury to find that she had participated in the conspiracy. As this Court observed in *Blumenthal* v. *United States*, 332 U.S. 539, 557: "Secrecy and concealment are

essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightfully gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others."

Petitioner made no pretrial motion, pursuant to Rule 12(b) (2) and (3) of the Federal Rules of Criminal Procedure, challenging the validity of the conspiracy charge. Her allegation here, in essence, amounts to the anomalous complaint that she was charged with fewer crimes than she could have been. Certainly this raises no issue warranting review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

JANUARY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959

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FILED
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JAMES R. BROWNING, Clerk

No. 606

In the Supreme Court

of the United States

OCTOBER TERM OF 1958

HELEN A. DAVENPORT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court
of the United States

OCTOBER TERM OF 1958

HELEN A. DAVENPORT,
Petitioner,

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UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

ARGUMENT

It is not petitioner's theory that is the novelty of this cause. The novelty is the mechanics of this indictment. It crowns a series of jointly charged substantive offenses with a conspiracy count whose material allegations consist of the allegations of the substantive offense incorporated by reference. Under this circumstance it then adds to the conspiracy count two "accused" neither accused of, nor mentioned in, the allegations of fact of the substantive counts upon which the conspiracy

count is purportedly based. As the Government's Brief in Opposition reflects, the efforts of counsel have so far failed to reveal any reported prior observations upon an attempt to indict in this fashion.

The fashion in which petitioner's co-defendants are indicted for conspiracy by this indictment has been approved by the Courts solely upon the theory that an inference of an agreement to commit a substantive offense is inherent in allegations and proof of its joint commission.

Upon what new and novel theory has petitioner been indicted?

Whatever it is, the practical difficulty that it faces is that the allegations of the first substantive count are not laid directly against petitioner. Only one of three alternative answers are possible in this situation:

Either the failure to charge petitioner directly with these allegations means nothing because generally speaking these allegations are not such allegations of fact as are material to a conspiracy count (which is not so); or it means nothing because although they are material allegations the Government can allege and prove some part, if not all, of an accused's ultimate personal participation in a "conspiracy" directly through such allegations and proof of the acts and intent of others (which ought not to be possible); or it means a great deal in that these allegations of fact are material allegations to this conspiracy count and as such must be charged directly as the act and intent of anyone to be found guilty of the latter (which is the true answer).

Petitioner certainly does challenge the sufficiency of the evidence against her. Reference to evidence that petitioner "participated in the conspiracy" must necessarily be a reference to evidence purportedly showing that she knowingly participated in the comission of a substantive offense from which such an inference can be drawn.

Under what allegations of fact charged against her, and against which she had opportunity to defend, could evidence of her participation in the substantive offense be adduced?

If this conspiracy count were in any way valid against petitioner, it is patent that it would limit the evidence necessary to sustain her conviction to direct evidence of an express agreement upon her part (of what nature it is impossible to say), as distinct from the evidence of participation in the substantive offense that could be adduced against her co-defendants under the allegations of the first substantive count incorporated therein.

Upon what basis can a citizen be imprisoned without an indictment informing them not only of the nature crime of which they are accused, but of the particular acts that *they* committed that are the *cause* of the accusation? Certainly not upon the Government's novel theory that a fataly defective indictment is no impediment to conviction if the evidence adduced at a trial is sufficient to have supported a proper indictment—if one had been made.

In order for this indictment to actually charge petitioner with the crime the Government thinks it charges against her, and in order for her conviction to be sustained under the proof adduced, the allegations against petitioner must be precisely the same as those made against her co-defendants. She must be charged with acts showing an intent to commit the substantive offense with others so as to permit evidence being adduced from which an inference can be drawn of her participation in an agreement with them to commit that offense. Proof that she has not been properly charged is as simple as pointing out that proof of her guilt of conspiracy depends upon the sufficiency of the evidence to prove the truth of the allegations of fact of the first substantive count against those charged therein.

Just how is petitioner expected to go about proving her co-defendants innocent of the issues of fact made against them in the first substantive count?

The Government's Brief in Opposition speaks of the conspiracy count incorporating by reference the "scheme" set forth in the substantive count as if a "scheme" has a life of its own separate from the acts and intent of those who have conceived it and by their acts have carried it into effect. The conspiracy count does not incorporate an amorphous "scheme". It incorporates allegations of fact of act and intent upon the part of those accused in the first substantive count, which, when proven, can establish nothing more than that those defendants intended such a scheme as it is alleged was made manifest by their actions.

Petitioner's conviction can only be upheld by finding against her upon the issues of fact made up by the first substantive count. By what necromancy does the conspiracy count turn these allegations of fact against her co-defendants into issues of fact as to her?

Petitioner sees nothing anomalous in her contention that allegations of fact of which she is not accused, and which do not mention her in their body, make up no issue of fact as to her. She sees nothing anomalous in her contention that the accusation of conspiracy can work no magic upon such allegations.

She sees nothing anomalous in her contention that the acts and intent set forth in the first paragraph of the first substantive count, being material allegations to the personal guilt of one accused of conspiracy, the indictment should have been so constructed as to make these allegations of act and intent personal to each defendant accused in that count.

Perhaps petitioner is a poor spokesman for what is wrong with this indictment and the total process by which her conviction was obtained. If so, then let the facts speak for themselves as to the results that will obtain if certiorari is not granted.

Past definitions of the crime of conspiracy will be swept away. Conspiracy will not be an accused's agreement to participate in a substantive offense; it will not be the agreement to be inferred from such participation. The accused "participates in the conspiracy," in the "scheme," which will not necessarily be something coincident with acts and intent of participation in the sub-

stantive offense at all, for "conspiracy" will be more of a "separate and distinct crime" than that, whatever that will mean.

The zealous prosecutor will be able to indict two or three for the commission of a substantive offense, and add a dozen in a conspiracy count charged with "conspiracy" to commit their crime, incorporated by reference. Once the guilt of those accused of the substantive count has been established, what "conspirators," if any, ought to be imprisoned in view of the circumstances revealed as surrounding their commission of the substantive offense, will be within the sound discretion of the jury.

As to rigors of proof—there will be none. The mere "conspirator" can offer no objection from start to finish of the prosecutor's case in chief. No more nonsense about prior proof of the existence of a "conspiracy." No more concern over examining the sufficiency or insufficiency of the evidence to warrant submission of the crime of "conspiracy" as to each accused.

Consider this indictment: The matter can be cut short to a simple formula. The Courts will pronounce that during its case in chief, the prosecution is obviously proving only the allegations of the substantive offense against those accused thereof as they appear in the original instance (and/or as incorporated in the conspiracy count). This is, and can be, of no concern to the "conspirator." His part in the proceedings can properly be delayed until the prosecution rests, for obviously any question as to the existence of a "conspiracy" can and

should rightfully be reserved until the Government has had the opportunity to conclude its efforts to prove the same.

It is when the prosecution rests that "conspirators" will have their opportunity to be heard. The question that they can then argue is the insufficiency of the evidence to sustain the allegations of the substantive offense as made against those accused thereof as they appear in the initial instance (and/or as incorporated into the conspiracy count). If the evidence is found sufficient to sustain the allegations of the substantive offense, then no matter with what equivalence it may touch upon any of the alleged "conspirators," (and it can touch upon them in no other fashion; after all they are not directly charged with the allegations of the substantive offense, and therefore the evidence has not had the direct object of proving them guilty thereof; to the contrary, it has necessarily raised a negative inference as to their lack of guilt thereof by being aimed at others) they will then be permitted to go forward and by testimony and argument plead with the jury to "acquit" them.

About all of the argument that can be exhibited in favor of this indictment is that the people can trust prosecuting officials to "administer" the law of conspiracy in a just, fair and impartial manner!

CONCLUSION

There was received in evidence (Def. Davenport Ex. 1) a letter from the Honorable Douglas McKay, a resident of the State of Oregon and then Secretary of the Interior for the United States, dated February 1, 1955 and addressed to petitioner, reading as follows:

" THE SECRETARY OF THE INTERIOR
WASHINGTON

FEB - 1 1955

Air mail

Dear Mrs. Davenport:

I was very pleased to note in a bulletin of the Portland Chamber of Commerce that you had been honored by being named "Woman of the Year" at a joint meeting of the Women's Forum and the Chamber of Commerce.

It is very fitting that you should be recognized for your great contribution in the citizenship program in Portland, as well as in so many community activities. The contribution that you have made to the progress and welfare of your city is well known to all of us and I join your many friends in rejoicing that you have been chosen for this special honor.

With kindest personal regards, I am

Cordially yours,

/s/ DOUGLAS MCKAY
Secretary of the Interior

Mrs. Lee Davenport
2051 Southeast Hawthorne Blvd.
Portland 15, Oregon"

Petitioner was condemned if she protested and condemned if she did not.

The Trial Court in its instructions was constrained to instruct that a defendant:

> " . . . may be chargeable even though he himself did not personally benefit from it, but if he participated and such participation permitted or assisted another person to defraud the co-op or the members." (Tr. 1778)

It is as contrary to reason now as it was in the 17th century for a woman of petitioner's age to change the character of a lifetime overnight for the purpose of gratifying a malevolent whim. The jury was charged with emotion over the enormity of the offense committed by those accused of the substantive counts when it returned this verdict against her.

It was a pseudo-legal procedure that robbed petitioner of any forthright defense for the Government to totally charge against others sole criminal responsibility for all wrong doing involved in the original instance, and to then follow this by leveling an accusation of "conspiracy" upon that account against petitioner.

Certiorari should be granted.

Respectfully submitted,

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